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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 457

NATHAN CHIARELLI and SAM SERRITELLA,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION

for certiorari to the United States Court of Appeals, Seventh Circuit.

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Opinion of Appeals Court Appended.

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THE UNITED STATES OF AMERICA,
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PETITION

for certiorari to the United States Court of Appeals, Seventh Circuit.

To the Honorable Fred Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

A.

Summary Statement of Matter Involved.

Petitioners waived trial by jury and were convicted, on all three counts, of an indictment charging violation of the law as to narcotics. Chiarelli was sentenced to three and Serritella to five years, on each count, to run concurrently. Tr. 143

The indictment, in count one, Tr. 2, charges a purchase of the drug from an unknown person, not in or from the original stamped package in violation of Section 2553 (a) Title 26, United States Code. Count two, Tr. 3, charges that they did knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of the drug, knowing same to have been illegally imported in violation of Section 174, Title 21. Count three, Tr. 3, alleges that the defendants conspired to commit the crimes alleged in the first two counts.

On January 28, 1950, two Chicago policemen, Wallace, Tr. 9, and Page, Tr. 45, acting upon an anonymous telephone call received three weeks previously, Tr. 18, waited in their automobile at 41st Street and Calumet Avenue in Chicago for the appearance of a certain car of which they had the license number and a description. When Serritella drove Chiarelli in this automobile to this vicinity, the officers moved in on them in order to make an arrest. Chiarelli, who had left the car and had walked across the street, threw down a package, and endeavored to flee on foot, when one of the officers ran toward him with a gun. He was shot by the other officer and apprehended a short distance from the car. The package was recovered and later turned over to the federal agents. It bore no stamps. Chiarelli told the police, Tr. 14, 49, 60, 64, that he was engaged in making delivery, at the request of a colored man, who gave him the package at a restaurant. Chiarelli claimed that he did not know what was in the package. Tr. 49

Serritella escaped from the scene in his automobile. He was arrested by a federal agent, Tr. 82, on February 18, 1950, while in the company of Chiarelli.

The Government, in order to corroborate the identification, showed that the automobile driven by Serritella, was purchased by him, Tr. 66, and had been registered in the name of a person who could not be found.

Mr. Schaefer, a government chemist, found the contents of the package to be heroin hydrochloride. Tr. 87 The five envelopes, originally wrapped in newspaper, Tr. 80, were emptied of their contents and turned over to Mr. Sheehan, a government fingerprint expert. He found the impression of the left little finger of Serritella on each of two envelopes. Tr. 93

The defendants did not testify. They offered some evidence, Tr. 103, upon issues no longer in the case.

The arrests were made without warrants. Considerable argument was made in the trial court, in an effort to suppress and exclude the drugs and evidence based upon same, upon the claim that the search and seizure was illegal.

At the conclusion of the evidence for the Government each defendant made a motion for finding of not guilty as to each count. Tr. 100 Like motions were made and overruled after all of the evidence was heard. Tr. 111

The point upon which we hope to cause Your Honors to take jurisdiction involves the proof of venue. We contend that this element was not proved. The Court of Appeals found that the evidence established venue and that moreover, the absence of tax paid stamps and possession of the drugs constituted prima facie evidence of illegal purchase, and also venue.

It is our contention that Congress is without power to dispense with proof of venue. A correct construction of the statute requires evidence of venue. The Appeals Court is in error on three main points:

(a) There is no evidence of venue.

(b) The statute does not create a presumption of venue.

(c) If the Court of Appeals has made a proper construction of the statute it must follow that the statute is unconstitutional.

B.

Basis of Court's Jurisdiction.

By certiorari the Supreme Court may require any cause in the United States Court of Appeals to be certified to it for determination.

Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 28 U.S.C.A. § 347, provides that "in any case . . . in a Circuit Court of Appeals . . . it shall be competent for the Supreme Court . . . upon the petition of any party thereto . . . to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted . . . appeal."

Under this statute extensive power is conferred on the Supreme Court. *Gay* v. *Ruff*, 292 U.S. 25. The purpose of this grant of power was to secure uniformity of decision and to bring up cases of importance which it is in public interest to have decided by the court of last resort. Authorities collected in 36 C.J.S. § 204, p. 108; *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202; *Magnum Import Co.* v. *Coty*, 262 U.S. 159; *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217.

Under Supreme Court Rules, rule 38(5), 28 U.S.C.A. following § 354, a writ of certiorari may be granted where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter: *Griffin* v. *McCoach*, 313 U.S. 498; *Bingham's Trust* v. *C.I.R.*, 325 U.S. 365; *Halvering* v. *Price*, 309 U.S. 409; *Ticonic Nat. Bank* v. *Sprague*, 303 U.S. 406; *In re 620 Church Street Bldg. Corp.*, 299 U.S. 24;

Stelos Co. v. *Hosiery Motor-Mend Corp.*, 295 U.S. 237 (The decision in the case at bar on venue conflicts with *Brightman* v. *United States*, 12 Fed. 2nd 532 (8th Circuit), followed in *Cain* v. *United States*, 12 Fed. 2nd 580 (8th Circuit)); or has decided an important question of federal law which has not been, but should be settled by the Supreme Court. *Postal S.S. Corporation* v. *The El Eselo*, 308 U.S. 378; *Carpenter* v. *Winn*, 221 U.S. 533; *Public Service Commission of Missouri* v. *Brasher Freight Lines*, 312 U.S. 621; or has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court. *Galloway* v. *United States*, 319 U.S. 372; *Department of Treasury of State of Indiana* v. *Ingram-Richardson Mfg. Co. of Indiana*, 313 U.S. 252; or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464; *United States* v. *Rizzo*, 297 U.S. 530; *LeTulle* v. *Scofield*, 308 U.S. 415.

C.

Question Presented.

May Congress, by the creation of a presumption, throw the burden of proof upon a defendant in such manner as to dispense with the ordinary safeguards surrounding one charged with crime?

D.

Reasons for Granting Writ.

1. The United States Court of Appeals has decided important questions of federal law, which have not been, but should be settled by this Honorable Court.

2. The United States Court of Appeals has decided important questions of federal law in a way in conflict with applicable decisions of this Honorable Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

3. Differences of view among the various United States Courts of Appeal in the construction and application of federal statutes require the interposition by this Honorable Court by certiorari under the direct conflict rule. The decision of the Court of Appeals in the case at bar on venue is in direct conflict with *Brightman* v. *United States*, 7 Fed. 2nd 532 (8th Circuit) and *Cain* v. *United States*, 12 Fed. 2nd 580 (8th Circuit).

4. Questions of the jurisdiction and procedure of federal courts are involved, where there are various conflicting decisions in the United States Courts of Appeal.

5. The meaning of due process, as applied to one indicted for a felony, should be further settled by this Honorable Court, particularly as to the power of the Congress to take away this right.

6. We present a case of first impression as to whether Congress has the power to dispense with proof of venue.

7. The rights of many persons charged with crime and to be so charged will be affected one way or another, depending upon the decision of this Honorable Court.

8. The United States Court of Appeals has held that, under the authority of *Casey* v. *United States*, 276 U.S. 413, the absence of tax paid stamps and possession of the drugs constituted prima facie evidence of illegal purchase, and also venue. We contend that, through oversight, inadvertence or misunderstanding, the court below has erroneously applied the said decision. This Honorable Court should issue the writ in order to explain, clarify and distinguish its prior decision.

PRAYER.

Your petitioners file the record here and pray for the Writ of Certiorari and that the judgment be reversed.

NATHAN CHIARELLI,
SAM SERRITELLA,
Petitioners.

LOUIS J. GILIBERTO,
WM. SCOTT STEWART,
Counsel for Petitioners.

STATUTES INVOLVED.

Title 18 U.S.C. Sec. 371.
Title 21 U.S.C. Sec. 174.
Title 26 U.S.C. Sec. 2551 (a).
Title 26 U.S.C. Sec. 2553 (a).

Pertinent portions of the statutes are set out in the opinion rendered by Judge Finnegan, hereto appended.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The trial court rendered no opinion. The opinion of the United States Court of Appeals appears in the record and is appended. It has not yet been reported.

II.

Jurisdiction.

The judgment to be reviewed was entered November 5, 1951. Your Honors have jurisdiction by virtue of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 28 U.S.C.A. § 347 as supplemented by the rules of this Court.

III.

Specifications of Errors.

1. The United States Court of Appeals erred in affirming the judgment of the trial court.

2. There is no evidence, direct or circumstantial, to prove that the defendants, or either of them—

(a) bought the drugs as alleged in the first count;

(b) or did the things charged in the second count;

(c) or conspired as alleged in the third count.

3. The presumption created by statute arising from possession does not apply because:

(a) Serritella is not shown to have had possession.

(b) Chiarelli had a package under his arm, but there is no evidence to show that he knew its contents.

(c) In order to give rise to the presumption, possession must be exclusive.

(d) If the statute can be construed to make guilt presumptive in this case, it is unconstitutional.

4. There is no evidence, direct or circumstantial of a conspiracy.

(a) Chiarelli could not conspire with himself. As only two conspirators are named and one is clearly not proved guilty, the judgment must be reversed as to both.

(b) The nature of the case is such that the conspiracy cannot be established without proof of the substantive crimes charged. Such crimes cannnot be proved without the benefit of the presumption created by statute. The statute limits the use of the presumption to prosecutions under the statute.

5. The statement made to the police by Chiarelli, is not to be considered as against Serritella, having been made in his absence.

(a) As to Chiarelli, this statement having been introduced as part of the case for the Government is to be accepted as true. It put an end to any presumption.

6. The fingerprint evidence is not to be considered as against Chiarelli, in the absence of evidence showing any connection.

(a) As against Serritella, it has practically no value, for the reason that it can be explained upon a hypothesis of innocence as readily as one of guilt.

7. The defendants, or neither of them, have been proven guilty of the charge made in any or all of the counts.

8. If the Government does see fit to rely upon the presumption, still evidence of venue will be absent.

9. The Government failed to prove

(a) the quantity of the drug in the package.

(b) proof that it is heroin hydrochloride does not satisfy the proof required under the description in the indictment.

(c) there is no proof that the drug was imported and no showing of circumstances to give rise to any presumption in this regard.

PROPOSITIONS OF LAW RELIED ON.

I.

Possession to be incriminating must be personal and exclusive.

Willsman v. *United States*, 286 F. 852.
Grantello v. *United States*, 3 F. 2nd 117.

II.

Where one is found in possession of a package containing drugs it is necessary to show knowledge of the contents.

Ching Wan v. *United States*, 35 F. 2nd 665.
Morei v. *United States*, 127 F. 2nd 827.

III.

The conspiracy must be that charged.

Lambert v. *United States*, 101 F. 2nd 960.

IV.

The fingerprint evidence is of no value when the circumstances are considered.

See dissenting opinion in *Stoppelli* v. *United States*, 183 F. 2nd 391 for rule and authorities.

V.

The presumption created by the statute from possession does not arise as to the drug in evidence.

United States v. *One Studebaker Automobile*, 40 F. 2nd 557.

VI.

There was no evidence of venue, and the presumption created by the statute does not supply this essential proof.

Brightman v. *United States*, 7 F. 2nd 532.
DeMoss v. *United States*, 14 F. 2nd 1021.

VII.

One cannot conspire with himself.

Morrison v. *California*, 291 U.S. 82.

VIII.

A reversal as to one of two conspirators in a case such as this requires reversal as to the other.

Feder v. *United States*, 257 F. 694.

IX.

One in possession need not prove lawful importation, he need only explain possession.

United States v. *Turner*, 65 F. 2nd 587.

X.

In many cases this Honorable Court has granted certiorari in order to explain, clarify or distinguish its prior decisions.

Many of the authorities on this point have been collected by Messrs. Wolfson and Kurland in Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States,* Section 344, page 677.

SUMMARY OF ARGUMENT.

There was no proof of venue. The Court of Appeals finds that venue was proven by direct evidence. We dispute this finding and ask Your Honors to examine the record.

The Court of Appeals has construed the statute in such manner that proof of venue is not necessary. We ask review of this construction and contend that the statute creates no such presumption. We argue that if the statute is to be so construed, it is unconstitutional.

We demonstrate the weakness of the case against petitioners in order to show that without the presumption the Government had no case at all.

We attack the evidence for the Government under the following headings:

Serritella Did not have Possession.

No Proof of knowledge on the part of Chiarelli.

The Fingerprint Evidence.

Insufficiency of Proof as to Drug.

Failure to Prove Venue.

Failure of Proof as to the Conspiracy.

The Statement made to the police by Chiarelli.

ARGUMENT.

No proof of venue.

If Your Honors did not have the record and we were not permitted to dispute the ultimate findings of the Appeals Court, the following, which we quote from Judge Finnegan would end the matter.

> "Defendants claim that venue was not established on the trial. The record before us is replete with references to the facts in evidence taking place in Chicago, Illinois.
>
> "If, upon the whole evidence, it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient. *United States* v. *Jones*, 174 F. 2d 746-749. This record shows direct and positive proof of venue in Chicago, Illinois. And, of course, Chicago is in the Northern District of Illinois, Eastern Division. Moreover, the absence of tax-paid stamps and possession of the drugs constituted prima facie evidence of illegal purchase, and also venue."

Permit us to first declare that we have no quarrel with the following proposition of law, which we quote from the above excerpt from the Appeals Court opinion.

> "If, upon the whole evidence, it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient. *United States* v. *Jones*, 174 F. 2d 746-749."

It was thought by Judge Finnegan that our point was decided against us here in this Honorable Court in *Casey* v. *United States*, 276 U.S. 413. In the *Casey Case*, Mr. Justice Holmes pointed to circumstances from which venue was proved. We have no such circumstances in the case at bar.

It is true that petitioners were observed by the officers in Chicago and they committed some acts there. We do not dispute the proposition that proof of a crime in Chicago would satisfy venue requirements. The Court takes judicial notice that Chicago is within the District.

It is our contention that those acts could just as well relate to innocence or other crimes. We repeat further from the above quotation.

> "Moreover, the absence of tax-paid stamps and possession of the drugs constituted prima facie evidence of illegal purchase, *and also venue.*" (Emphasis added.)

It is our contention that the record is devoid of proof of venue. In order to demonstrate this point we must analyze the evidence and at the same time understand what is meant by the presumption created by statute. If the statute is to be construed as a dispensation of proof it is unconstitutional. If it be properly construed, the evidence in the case at bar is insufficient.

As we have said, if Your Honors choose to look no further than the opinion of the Court of Appeals relief here is precluded. Judge Finnegan said, "This record shows direct and positive proof of venue in Chicago, Illinois."

We are aware that if the record presented circumstances from which it could be properly inferred that venue had been proved, as in the *Casey case*, we would be wasting the time of this Honorable Court to argue that the conclusion arrived at by Judge Finnegan is unreasonable. It is our claim that there is a total absence of proof.

Our respectful suggestion as to how it happens that Judge Finnegan is able to find from the circumstances in proof that venue was established is that the Honorable Judge lost sight of the proposition that petitioners must be proved guilty of the crime charged. Just any old activity

in Chicago, legal or illegal, will not warrant one in concluding that the crime charged was committed in Chicago, or that the activity related to the crime charged.

We respectfully insist upon our point, knowing very well that it is a familiar principle, repeatedly applied in the decisions of this Honorable Court, that the findings of fact concurred in by two lower courts will be accepted here, unless clear error is shown. Some of the authorities have been collected on this well settled rule in *Jurisdiction of the Supreme Court of the United States, Robertson & Kirkham,* by Wolfson & Kurland, Section 333, p. 659.

We respectfully submit that Judge Finnegan is in error when he finds that the record shows direct proof. There is not one scintilla of direct proof that either petitioner committed the crime charged anywhere. The Government was compelled to rely upon the presumption created by the statute to prove the crime. This presumption should not be extended to include proof of venue.

The opinion of the Court of Appeals can be broken down in this manner.

(a) The petitioners were found in possession of the drugs in Chicago.

(b) The absence of tax-paid stamps and possession constituted prima facie evidence of illegal purchase.

(c) Therefore it follows, from the presumption, that illegal purchase took place in Chicago.

It is our contention that:

(d) The above holding, (c) i.e., that the statute creates a presumption that the purchase took place in Chicago, is erroneous.

(e) Without this erroneous construction of the statute there is absolutely no proof, direct or circumstantial, that the purchase was in fact made in Chicago.

The trial judge had no right to infer, from the fact of possession and the circumstances in evidence that the illegal purchase took place in Chicago.

Now if Your Honors will be good enough to examine the record to determine if it contains circumstantial evidence to prove that the purchase was made in Chicago, it is our contention that there is no such evidence. Everything done by petitioners is just as consistent with a purchase in Indiana, or anywhere else, as in Chicago.

In order to demonstrate the weaknesses of the case against petitioners and to show that, without the erroneous view of the extent of the presumption, the Government had no right to a conviction, we point out errors that ordinarily would not be reviewed here. In other words it is our contention that the presumption was extended to take the place of proof and to dispense with due process.

Serritella Did not have Possession.

As was held in *Willsman* v. *United States*, 286 Fed. 852; the general rule is that possession, to be incriminating, must be personal and exclusive.

In *Henry Woo* v. *United States*, 73 F. 2nd 897 the defendant admitted possession of the packages, his defense was that he was not aware that drugs were contained in them. This was held to be a question for the jury and resolved against this particular defendant. In *Grantello* v. *United States*, 3 F. 2nd 117 the drugs were found in the home. The contest was over the question as to whether the defendant was living there or had separated from his wife. The defendant lost before the jury but the Court of Appeals, after setting out the evidence pro and con in detail, held that there was an absence of substantial evidence that the defendant had any knowledge of the exist-

ence or location of the drugs, much less any control or possession thereof. The situation is compared to another, we quote p. 118:

> "Possession of the instruments or fruits of crime by a defendant in order to be incriminating must have been known to him, actual, dominant, with plenary power of disposition."

The Court of Appeals disposed of our point here by a quotation of a familiar rule from *United States* v. *Cohen*, 124 F. 2nd 164, as follows:

> "Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. *United States* v. *Hodorwicz*, 7 Cir., 105 F. 2d 218, 220, certiorari denied, 308 U.S. 584, 60 S.Ct. 108-84 L.Ed. 489; *Vilson* v. *United States*, 9 Cir., 61 F. 2d 901."

The trouble with this dispostion by the Court of Appeals, as we see it, is that that Honorable Court assumes as a fact that Serritella aided in the illicit transaction to which possession was incidental. If Serritella had been the motorman of a street car, or the driver of a taxi, the presumption of innocence might not have been lost sight of. It is our contention that no circumstance or set of circumstances has been shown from which to conclude that Serritella aided in the transaction described in the indictment. We must never lose sight of the indictment. If judgments are to be supported by conduct, which arouses suspicion, or may be consistent with guilt there has been an end to due process in narcotics cases.

No proof of knowledge on the part of Chiarelli.

As to Chiarelli, there is no evidence to show that he knew what was in the package. He told the police he did not know. Tr. 49 It is true that he tried to flee but his fear could have been from many causes. Officer Page testified that he ran toward him with his gun in his hand, said police officers, and shot in the air. Tr. 52 The other officer testified that he shot him from a sitting position in the officers' car. Tr. 29 It would be surprising if the man did not try to run away. Discarding the package may have been part of his effort to get away quickly. The record shows practically nothing about the shape, size or appearance of the package, further than that it was wrapped in newspaper. Tr. 80 The burden was on the Government. If there was some circumstance from which to infer that Chiarelli knew what was in the package, it should have been shown. Then after the Government asks the Court to presume or infer, from the circumstances, that Chiarelli knew the contents, the Government must go further and ask Your Honors to base another presumption. The law does not permit this. The authorities on this fundamental principle are collected in 31 C.J.S. Sec. 116b, p. 727.

In *Ching Wan* v. *United States*, 35 Fed. 2nd 665; the evidence was held insufficient where the defendant was not shown to have knowledge of the contents of a box or of the criminal purposes of other parties. This rule can very well be applied to Serritella and also to Chiarelli. If the statement made by Chiarelli to the police has any value as evidence, it can be used only as against Chiarelli. The arrest had put an end to the venture. Serritella was not present and nothing said by Chiarelli could be used against him.

In *Morei* v. *United States*, 127 F. 2nd 827 the Court examined the evidence and found it insufficient to support

a verdict against a chauffeur of the principal who drove principal's automobile when narcotics were procured. We quote the familiar rule, p. 830:

> "To constitute a principal in the second degree, mere presence at the crime is not enough; there must be a common purpose and intent to aid or encourage the persons who commit the crime, and on an actual aiding or encouraging."

In *Beland* v. *United States*, 117 F. 2nd 958 the Court said:

> "Conjecture and suspicion place Barkley with the conspirators, but when we come to search out the evidence of guilt from the record we find it lacking."

In *Lambert* v. *United States*, 101 F. 2nd 960 the Court said:

> "Appellant could have been guilty of a conspiracy to sell and also of aiding and abetting in the sale. The difficulty here is with the proof. All that it shows is that appellant acted with Christian in his efforts to purchase. It does not show that he was in any sense acting in concert with the Hargroves, the sellers. His concert was with Christian, the purchaser, not with the Hargroves, the sellers. Under the evidence he could no more have been held guilty of a conspiracy to sell than could Christian."

In the case at bar the indictment charges, Tr. 3, a conspiracy to purchase and receive, conceal, buy and facilitate transportation. If we are to guess the defendants into a conspiracy with the colored man our further guess would be that he was a seller. The buyer was never mentioned, identified or described and it is not shown that the defendants had ever seen him or her, or had any dealings with the buyer.

The Court of Appeals disposed of our contention as follows:

> "It is also contended that the proof failed to show that Chiarelli had knowledge of the contraband nar-

cotic contents of the package he threw into the street in trying to flee from officer Page. Whether he had such knowledge was a question for the trier of the facts—*United States* v. *Feinberg*, 123 F. 2d 425. And inferences reasonably drawn from evidence presented are also for the fact trier. *Rendleman* v. *United States*, 38 F. 2d 779, 780."

We knew very well that whether Chiarelli had such knowledge was a question for the trial judge. But that power does not preclude us from a review of the finding. There is not a scintilla of evidence to show that Chiarelli knew that the package contained drugs. It is true that the trial judge had a right to draw inferences, but first there must be some fact from which the inference may be drawn. If the evidence of guilty knowledge be circumstantial, it must meet the familiar tests placed on such evidence.

The Fingerprint Evidence.

In *Stoppelli* v. *United States*, 183 Fed. 2nd 391; the court divided on the sufficiency of evidence furnished by a fingerprint expert. It will be noticed that the expert in the *Stoppelli* case gave an opinion as to the time in which the print had been made, and also that it had been made while the envelope contained a powdery substance. The expert in the case at bar gave no opinion further than he found a print on each of two envelopes. The envelopes were empty when he examined them. He gave no opinion or circumstance to exclude the possibility that they were empty when touched by Serritella. Here again, if the evidence is to have any value, Your Honors must presume that the envelopes contained the drug.

We quote from 31 C.J.S. Sec. 116b, p. 727 and refer to the cases there cited:

"An inference of fact should not be drawn from premises which are uncertain, but the facts on which

> an inference may legitimately rest must, it is said, be established by direct evidence as if they were the very facts in issue. It follows that one presumption cannot be based upon another presumption, and it has been broadly asserted in many decisions that inferences cannot be founded on inferences."

Your Honors must guess as to the time when Serritella touched the envelopes, and guess as well the place, also Serritella's knowledge or purpose. We respectfully refer Your Honors to the dissenting opinion by Judge Denman, and cases there cited in the *Stoppelli* case to the effect that where the inference to be drawn from a single fact proven are as strong for innocence as they are for guilt, the judgment of conviction must be reversed.

In the absence of any proof to show when Serritella touched the envelopes, the fingerprint evidence must be entirely disregarded as to Chiarelli. Chiarelli was not shown to have been present when the fingerprints were made, nor is there any evidence from which to infer that they were made during the performance of a joint venture.

We quote from Moore on Facts, 1908, p. 1375:

> " '§ 1236 Opinion Evidence versus Facts.—An ounce of fact is worth a pound of opinion,' said Judge Roosevelt of the New York Supreme Court. Opinion evidence falls to the ground as utterly worthless when inconsistent with clearly proved facts or with reason and common sense as applied to other credible evidence."

Officer Page testified that the packages fell all over the street and he picked the stuff up. Tr. 48 He put his initials on the exhibits when they were turned over to Officer Mangan. Tr. 49 Officer Wallace said he helped to check the packages and put his initials on the exhibits. Tr. 16, 17, 18 Officer Blazek testified that he put his initials on the exhibits. Tr. 61

Officer Mangan turned the exhibits over to Federal Agent

Newman. Tr. 79 Agent Fonner testified that he received the exhibits from Mr. Newman. Tr. 78 Mr. Newman testified that the drug was in five cellophane bags, wrapped in newspaper. Tr. 80 That he transferred the drugs to other bags, after placing his initials on the envelopes, he gave them to Mr. Sheehan. Tr. 81 Mr. Newman took Serritella's fingerprints on February 18, 1950, Tr. 82, and showed them to Mr. Sheehan. Tr. 90 Mr. Sheehan apparently did not make his examination in search of fingerprints until after the arrest of Serritella. Tr. 94 Your Honors are left to speculate just why the Government did not look for Chiarelli's fingerprints, or those of the colored man, or any one else before this time. It may just be a coincidence that the expert found the print of the same little finger, and only one on each of two envelopes. He speaks of none on the other side of any envelope.

Mr. Sheehan testified that he worked on them a week or more before he submitted a report. The indictment was filed February 21, 1950. Tr. 2 So Serritella was arrested and indicted before his fingerprints were found.

Naturally Your Honors will wonder how the envelopes could be handled so many times without other fingerprints appearing. Does Mr. Sheehan's answer, above set out, that he was not able to identify them as belonging to this case, mean that other fingerprints were ignored, because they did not belong to Serritella? At any rate, we submit that the fingerprint evidence is of little or no value.

The Court of Appeals disposes of our contention as follows:

> "The fingerprint evidence was properly admitted and considered by the trial court in arriving at its finding and judgment."

Our complaint was not that it should not be considered carefully. If we are correct, it will be seen that it has no value.

We continue to point out the many weaknesses in the case made by the Government to show the great reliance placed upon the presumption to make out a case, in the absence of the required proof beyond a reasonable doubt.

Insufficiency of Proof as to Drug.

The indictment in each count alleges "a quantity of a certain derivative of opium, to-wit 177 grains of heroin." The proof is silent, as far as we can find, as to the quantity. The powder was put into evidence. Yet we submit it will require some expert analysis to ascertain the amount of the drug. In *Chadwick* v. *United States*, 117 F. 2nd 902, it was shown in evidence that heroin was smuggled into this country in its pure form and was then processed, manufactured or cut to increase its quantity by adulteration and admixture with chemicals. The Government expert, Tr. 87, in the case did not say that the powder before the Court was unadulterated. We are left to guess. Our guess would be that it had been adulterated and we have nothing upon which to venture a guess as to how much.

In *United States* v. *Holmes*, 187 F. 2nd 222, the defendant claimed that lack of proof of quantity did not exclude the benefit of a statute. Title 26 U.S.C.A. § 2551 (a) which exempts preparations containing not more than one-eighth of a grain of heroin. The Court of Appeals held that the point had been waived by stipulation and that the burden was on a defendant to bring himself within the statute.

These defendants agreed, Tr. 78, that whatever was in the package came through the original channel. That is they did not dispute the identity of the exhibit. (One of

the policemen was unable to testify. Tr. 79) The defendants made no further stipulation and by their plea of not guilty it was required that the Government prove the charge as laid.

We quote all that is shown by the record concerning the powder: Tr. 87

> Mr. Ward: Q. Mr. Schaefer, I show you Government Exhibit No. 5, now marked for identification and ask you whether or not you have analyzed the contents of such exhibit? A. I did.
>
> Q. What did you find the contents to contain? A. Heroin hydrochloride."

In the *Holmes* case, as we have said the defendant claimed that there was no proof of a sufficient quantity to take the heroin under the act, citing *United States* v. *Jones*, 174 F. 2nd 746; *Chin Gum* v. *United States*, 149 F. 2nd 575 and Sections (a) 2553, 4 and 1 of Title 26. The Government in opposition relied on the *Chin Gum* case and *Stetson* v. *United States*, 149 F. 2nd 575, 577.

In the *Holmes* case, the defendant also claimed that the Government did not prove heroin to be a derivative of opium and cited *United States* v. *Hammers*, 241 F. 542; *Lowe* v. *Farwerke-Hoescht Co.*, 240 F. 671 and *United States* v. *Jim Fuey Moy*, 241 U.S. 394. The Government asserted that it need not prove heroin to be a derivation of opium, and cited *James* v. *United States*, 61 F. 2nd 912; *Ryan* v. *United States*, 283 F. 975 and *Hughes* v. *United States*, 253 F. 543.

The Court held, p. 225, that under the circumstances where the defendant stipulated, the Court as a matter of judicial knowledge was justified in affirming the trial court's finding that heroin is a derivative of opium. The Court of Appeals in addition to some of the cases relied upon by the Government cited *Chadwick* v. *United States*,

117 F. 2nd 902, 903; and *Greenberg* v. *United States,* 285 F. 865, 867.

The indictment in the case at bar describes the drug as "a quantity of a certain derivative of opium, to-wit, 177 grains of heroin."

This identification is erroneous as heroin is a derivative of morphine: *State* v. *Brennan,* 89 Mont. 479, 485, 300 P 273, 275; *Baker* v. *State,* 123 Tex. Cr.R. 209, 58 S.W. 2d 534; *Tidd* v. *Skinner,* 255 N.Y. 422, 424, 122 N.E. 247, 248, 3 A.L.R. 1145, 1147 and morphine is a derivative of opium: *State* v. *Brennan,* 89 Mont. 479, 484, 485, 300 P. 273, 275; *Jefferson* v. *State,* 244 P. 460, 461; *James* v. *United States,* 279 F. 111, 112; *Baker* v. *State,* 123 Tex. Cr.R. 209, 58 S.W. 2d 534; *State* v. *Vallie,* 82 Mont. 456, 461, 268 P. 493, 494; *Commonwealth* v. *Gabhart,* 160 Ky. 32, 35, 169 S.W. 514, 515. We quote from *State* v. *Brennan,* 89 Mont. 479, 484, 485, 300 P. 273, 275 (1931):

> "Heroin is a derivative of morphine, which in turn comes from opium. *State* v. *Wong Fong,* 75 Mont. 81, 85, 241 P. 1072, 1074 (1925), defined a derivative; anything obtained or deduced from another."

According to Webster's New International Dictionary, 2d ed., unab., the word "derivative" means "secondary." The word "secondary" in turn, according to the same source, means "immediately derived from or dependent on that which is original or primary." Thus, morphine is derivative or secondary to opium. The term "third hand," also according to the same source, means "derived . . . from the second after the original or primary source." Thus, heroin is derivative or secondary to morphine but is only third-hand to opium. Therefore, heroin is not a derivative of opium as the indictment states.

In the case at bar there was no finding that the drug in evidence is a derivative, unless such is to be inferred.

As we have said, there is no stipulation along this line. The Government is in much more difficulty here than in the *Holmes* case. It will take more than dictionaries or common knowledge to know that heroin and heroin hydrochloride are alike. Will Your Honors presume that when the indictment states heroin is a derivative of opium that that should be taken to mean that this compound is also and further that the Government might charge one and prove the other.

The Court in *Gulbeau* v. *United States,* 288 F. 731 found a fatal variance between a charge of morphine sulphate and proof of morphine hydrochloride. We submit that rather than to extend judicial knowledge into the realm of chemistry it would be better to require proof. The chemist was on the stand and it should have been a simple matter to have proved by him that heroin and the hydrochloride are the same, or alike. If such be the fact. The fact that the expert did not say so, or was not asked makes us wonder. It is possible of course, that his answers would have shown not only a variance, but a non violation.

More important is our desire to be rid of the presumption and we submit that the condition of the proof in this matter helps to do that very thing.

In the *Holmes* case, the Government quoted from a United States Treasury Department Bureau of Narcotics Annual Report for 1947, pp. 27, 28 which we repeat:

> "Raw opium is not produced in the United States and opium derivatives are not imported. All supplies of raw opium are, therefore, imported under official permit, and all supplies of opium derivatives are manufactured within the United States from the opium thus imported."

In *United States* v. *One Studebaker Roadster,* 40 F. 2nd 557 an agent testified that morphine hydrochloride, so far

as he knew, or believed, was not manufactured in the United States, particularly in the form in which the seized narcotic was found. The Court said, p. 558:

> "The evidence does not disclose that morphine hydrochloride cannot be manufactured in the United States, and even if the statutes or regulations pursuant thereto forbid its manufacture, the inference that it was manufactured in the United States in violation of law would be as logical as to infer that it was manufactured elsewhere and imported into the United States in violation of law. . . . I think, therefore, in cases such as this the Government should be held to clear and satisfactory proof touching the true character of the involved commodity, and as to that I am not satisfied in this case."

The Court of Appeals said in the case at bar:

> "If there is merit to the point it would apply only to count 1. The record shows no proof on the point, but lack of such proof will be of no avail to defendants, as it is not necessary that there be sufficient evidence to sustain a judgment of guilt on all counts of the indictment. Conviction on either counts 2 or 3 would support the judgment of conviction. *United States* v. *Hornstein*, 176 F. 2d 217."

We do not dispute the above rule, but respectfully insist that our objections concerning the required description of the drugs applies to all counts.

Failure to Prove Venue.

But, suppose we assume, for the sake of argument, that the defendants had possession of the package with guilty knowledge of its contents, still with that violent assumption the Government must face further difficulties. It was held in *Brightman* v. *United States*, 7 Fed. 2nd 532; that the presumption does not supply proof of venue. The *Brightman* case was followed in *Cain* v. *United States*, 12 Fed. 2nd

580 (8th Circuit), and in the Seventh Circuit in an opinion by Judge Evans in *DeMoss* v. *United States*, 14 F. 2nd 1021.

The *Brightman* case was cited by Judge Minton in *United States* v. *Jones*, 174 F. 2nd 746 in holding that proof of venue is necessary and that the sufficiency of evidence on this point was raised by the motion for discharge. The Court refused to take judicial notice that the streets referred to in the evidence are in any certain town.

In *Casey* v. *United States*, 276 U.S. 413; it was contended that a similar presumption created by statute does not and could not, consistently with the Sixth Amendment, extend so far as to show a purchase within the jurisdiction of the trial court. Mr. Justice Holmes pointed to circumstances, outside of the presumption, to show venue. We respectfully refer Your Honors to the dissenting opinions. There are no circumstances to save the case at bar. The Government offered no evidence of a purchase, or of any other act prohibited. There is no reason to infer that a crime, if one was committed, was perpetrated in the jurisdiction of the trial court. If the holding of the Court of Appeals, i.e., that the presumption created by statute can take the place of proof, is a proper construction of the statute, we respectfully contend that the statute is unconstitutional for the reasons indicated in the above dissents. Sixth Amendment to the Constitution.

Failure of Proof as to the Conspiracy.

There is no direct evidence of the existence of any conspiracy. The indictment merely charges Chiarelli and Serritella with conspiring with each other, no other person, known or unknown, is named as a conspirator. The only way the Government could prove the conspiracy would be to prove the guilt of Chiarelli and Serritella of the crimes

charged in counts one and two. Proof of guilt as to either count on the part of both defendants, with no proof of concert of action, would not suffice. There are cases wherein a conspiracy might be established by evidence constituting an attempt, or even less, but this is not such a case. Chiarelli could not conspire with himself, *Morrison* v. *People of California*, 291 U.S. 82, so a reversal as to Serritella would require reversal as to Chiarelli. *Feder* v. *United States*, 257 F. 694.

As in other criminal cases, a person charged with conspiracy is presumed to be innocent and the burden is on the prosecution to establish his guilt, his connection with, and participation in, the conspiracy and also that the offense charged was committed within the district where the venue is laid. The authorities are collected in 15 C.J.S. Section 91, p. 1139.

Mere knowledge or approval without participation does not make one a party to a conspiracy. The authorities are collected in 15 C.J.S. Section 39, p. 1062. An overt act alone is insufficient to constitute a conspiracy, there must be an unlawful agreement to which the overt act is referable. The overt act must be a subsequent independent act following the conspiracy, and done to carry into effect the object thereof. The authorities are collected in 15 C.J.S. Section 43, p. 1068.

In the case at bar the overt acts are alleged, Tr. 3, to be performed to effect the object of the conspiracy and are three in number.

1. Chiarelli and Serritella did meet and have a conversation.

There is no proof of this, direct or circumstantial, unless Your Honors assume that men riding in the same automobile must have met and held a conversation. But Your

Honors would be compelled to make further assumptions to bring this within the allegation of the purpose of the meeting.

2. That Chiarelli and Serritella did proceed in a certain automobile to the vicinity of 4054 Calumet Avenue, Chicago.

There is no evidence as to what might have been at such number, a store, office, apartment, or vacant lot. In fact Your Honors will be compelled to infer that this number is in the vicinity of the place described in the evidence by knowledge outside of the record concerning the system of street numbers. After such assumption, Your Honors will be left to assume that this automobile ride was for the purpose alleged.

3. That Chiarelli in the vicinity referred to in No. 2 above did emerge from the automobile carrying a certain parcel containing the heroin, in violation of Section 371, Title 18 United States Code.

Here again Your Honors must look beyond the record to find where 4054 might be. The record is devoid of any facts to prove that Chiarelli emerged from the car for the purpose of effecting the object of the conspiracy.

It is essential that the corpus delicti, which in the case of a conspiracy to commit an offense, is the conspiracy to do the act, be sufficiently established. Every essential fact necessary to constitute the conspiracy charged must be proved by sufficient evidence, including the necessary intent and the evidence must sufficiently establish the agreement of at least two persons. The conspiracy, of course, may be shown by circumstantial evidence and the conduct of the parties. However, the general rule that circumstantial evidence, to support a conviction must be such that the conclu-

sion drawn therefrom excludes every reasonable hypothesis other than guilt applies to conspiracy, and no conviction can be had when the evidence is as consistent with innocence as with guilt. The authorities on this familiar rule are collected in 15 C.J.S. Section 93, pp. 1146 to 1150.

In the case at bar, if the Government relies upon any presumption created by statute, another obstacle is to be found in the fact that the presumption is expressly limited to prosecutions brought under the statute. The prosecution for conspiracy is brought under an entirely different statute, Section 371, Title 18 United States Code. Tr. 4

In *Nigro* v. *United States*, 117 F. 2nd 624, after pointing out that the Harrison Act did not punish an addict for the purchase of drugs to satisfy his cravings, the Court said, p. 629:

> "It would contravene that policy to hold the immunity which the Anti-Narcotic Act itself confers is taken away by the conspiracy statute. *Gebardi* v. *United States*, 287 U.S. 112."

We do not find any mention of this point in the opinion of the Court of Appeals. As to our contention that there was not sufficient proof as to the conspiracy the Court of Appeals said:

> "Defendants contend there is a failure of proof of the conspiracy alleged. The record convinces us that the contention lacks merit.
>
> The evidence shows both defendants had possession of the heroin, the absence of tax-paid stamps; that the package thrown into the street by Chiarelli contained heroin, and possession of the drug was not explained to the satisfaction of the trier of the facts.
>
> The court believed the witnesses for the government and found defendants guilty, and the record before us supports that finding by substantial and convincing evidence."

As to the last paragraph above quoted, about the belief in the Government witnesses, we submitted our points, as is shown by the opinion, upon the assumption that the evidence must be reviewed in the light most favorable to the Government. No claim is made that the evidence is conflicting. The defendants offer no evidence on the points now disputed. We request Your Honors to accept such facts as were proved.*

Your Honors will note from the above quotation from the Court of Appeals that that Honorable Court found that

(a) The evidence shows heroin;

As we have said, we respectfully dispute this finding.

(b) Possession of the drug was not explained to the satsifaction of the trier of the facts.

Here again we dispute the finding of possession. The Court of Appeals overlooks the fact that the explanation was put in evidence by the Government.

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*The present attorneys were not in the case before the trial court. We venture a guess from the printed record that the trial judge did not believe the police officers. No one with his faculties could believe them. We mention this because it is apparent that the presumption created by the statute plus some suspicious circumstances make up the case for the Government. An ideal case in which to test out the value and extent of the presumption.

The Statement made to the police by Chiarelli.

We copy from the record in detail all of the evidence offered by the Government concerning that said by Chiarelli to the police.

OFFICER WALLACE.

Mr. Ward: Q. Later that day, in the Michael Reese Hospital, did you have the occasion to be present at the interrogation of the defendant, Chiarelli? A. I was.

Q. Who else was present, Officer Wallace? A. Officer Page, and Officers Blazek and Anderson of the Homicide Detail.

Q. Was there anything said by Chiarelli with respect to the package concerning which you have testified? A. There was.

Q. What did Chiarelli say, if anything? A. Chiarelli stated that he saw a colored man at Powell's Restaurant which is located at 22nd, between Michigan and Wabash. He said the man gave him a package, and also $50 to deliver this package. Tr. 14

OFFICER PAGE.

Mr. Ward: Q. Now, calling your attention to the Michael Reese Hospital in Chicago, were you present in the room with Chiarelli and with Officers Blazek, Anderson and your partner, Officer Wallace? A. I was in there for a little while, but we left Blazek and Anderson in there by themselves to talk to him.

Q. Did the defendant, Chiarelli, make any statement relative to the package in your presence? A. Well, he stated—I was in the room with him by myself for a little while. He said some guy gave him five bucks or something to deliver the package. He didn't know what was in it.

Q. Did he say whether it was a white man or colored man? A. A colored man.

Q. Where was this? A. Twenty-second Street. Tr. 48, 49

OFFICER BLAZEK.

Mr. Ward: Q. Calling your attention to January 28, 1950, Officer, did you have occasion to see the defendant, Nathan Chiarelli, at the Michael Reese Hospital? A. I did.

Q. Were you present in such hospital in which the defendant, Nathan Chiarelli, made any statements? A. Yes, sir, I was.

Q. Who was present in the room with you? A. Officer Page and Officer Wallace and Officer Anderson.

Q. What was said, if anything, by Chiarelli? A. He said, "I got $50 for delivering a package for a colored man on 22nd just west of Michigan Boulevard." Tr. 60

OFFICER ANDERSON.

Mr. Ward: Q. Did you have occasion to have a conversation with the defendant, Nathan Chiarelli? A. I did.

Q. What did you say to him and what did he say to you? A. I asked him how he was shot, what had happened.

At that time he told me that he had been delivering a package for a gentleman that he had received it from in front of Powers Restaurant on 12th Street between Michigan and Wabash Avenue, and that he was to receive $50 for this delivery.

Q. Did he identify the man as being a white man or colored man? A. A colored man. Tr. 64

The record includes the opening statement, objections, motions, and arguments of counsel, in fact it appears to cover everything said and done from the start to finish of the case. Not a word appears to show that the Government claimed any right to any presumption which might arise from possession.

The Court of Appeals, as Your Honors will note from the opinion, has set out quotations from the statutes, and

we respectfully submit has placed upon them an unwarranted construction.

We submit that when the Government Attorney elected to put in evidence the explanation given by Chiarelli to the police, the Government abandoned or destroyed any benefit it might otherwise have had under the statute. *United States* v. *Turner*, 65 Fed. 2nd 587, was reversed because the trial court did not properly instruct the jury. It was held that one in possession need not prove lawful importation. He need only explain possession.

The possession of stolen goods may give rise to a presumption of theft, but if the prosecutor proved the possession and went further and proved the explanation given by the defendant upon his arrest, it is very possible that the presumption would be destroyed. The defendant in such case might elect to not go forward with further proof. We quote from Moore on Facts 1908, p. 516:

> "§ 545. Presumptions versus Facts.—Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear. Presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."

We quote from 31 C.J.S. Section 114, p. 723 and refer Your Honors to the authorities there assembled:

> "Presumptions are indulged in only to supply facts and do not arise where the facts are known."

Guaranty Trust Co. v. *R.R. Co.*, 36 F. 2nd 747; *Haiss* v. *Link Belt Co.*, 50 F. 2nd 450; *Parrott* v. *Noel*, 8 F. 2nd 368; and *Athens Roller Mills Co.* v. *Commissioner*, 136 F. 2nd 125.

We are not here dealing with a case wherein the statement made by the defendant to the police was shown as

a mere incident to complete the picture. Nor have we a case wherein the defense elicited the statement on cross-examination. Here the Government put in the evidence as an independent fact—called witnesses especially to prove this fact—witnesses who were called for no other purpose. We believe the situation can be compared to that suggested in the following which we quote from 32 C.J.S. Sec. 1040, pp. 1104, 1107:

> "As a general rule, a party is bound by uncontradicted evidence produced by him to prove a particular fact or facts; and where he introduces a witness to testify on his behalf he ordinarily vouches for the credibility of his testimony, and, in the absence of contradictory evidence, is bound by such testimony, although the testimony was objected to by the adverse party. In accordance with this rule, a party who has introduced certain evidence cannot subsequently object that it should not have been received, or that it should not be given such consideration as its natural probative value entitled it to. * * *
>
> "As a general rule, a party calling his adversary as a witness vouches, at least to some extent, for his credibility, and is concluded by his testimony, so elicited, if it is not contradicted or proved false, and this rule also applies to testimony so elicited from an officer, employee, or servant of the adverse party. A party on whom it is incumbent to prove an alleged fact cannot call his adversary as a witness as to that fact, elicit testimony from him to the effect that such alleged fact has no existence and then call on the jury to discredit the evidence of such adversary merely because he is interested as a party, and to base on the assumed falsity of his evidence an affirmative finding of the existence of such alleged fact, without any other evidence of its existence, or from which it may be inferred."

In the case at bar, if the Government had elected to rely upon evidence of possession to create a presumption that Chiarelli bought the drugs, or did the other acts charged,

it should have rested on the proof of possession. Now that the Government proved that Chiarelli said he was merely acting as a delivery boy, without knowledge of the contents of the package, we submit that the presumption has been destroyed. The Government made no effort to prove that his explanation was false. The Government Attorney did not argue that it was improbable or unreasonable. As soon as the Government accepted the fact that Chiarelli received the package from a colored man for delivery, this fact gives rise to many explanations consistent with the innocence of Chiarelli, in addition to the one suggested, i.e., one without knowledge of the contents of a package cannot very well be guilty of the crimes charged.

We have no way of knowing who the colored man might have been. He could have been a federal agent for all we know.

If we are left to guess the part taken in the transaction by the colored man, he may have been either a seller or a buyer. It makes a difference if the indictment be not forgotten. If there ever had been any interstate transportation, it may have still been in operation, or it may have come to a halt, depending on who the colored man might have been and what had been done by him.

It does seem strange that when the police found Chiarelli willing to explain his part in the transaction that they did not ask further questions. Police usually do. If they had asked further questions, seeking to learn the identity or description of the colored man, and Chiarelli had refused to answer, the Government would have proved such refusal, to discredit his explanation. But for some unexplainable reason, the Government must wish us to believe that Chiarelli told the truth and that the police were satisfied with his explanation. We would naturally expect the police to ask questions about the man who drove the car and escaped.

Serritella was an unknown fugitive at the time. Wouldn't the police inquire if the driver of the car was to share the profit of the trip? Wouldn't they ask when and where he met his companion? Wouldn't they ask the name and address given Chiarelli by the colored man for the purpose of delivery?

Your Honors will note that Officer Page said the reward was $5. The others say $50, which is quite a difference. Chiarelli was searched immediately upon his arrest. Tr. 54 Where was the $50? Or was it $5? Otherwise the four officers agree on what was said by Chiarelli. Except that one of them said it was 12th Street. Tr. 64 Not one of them said that Chiarelli used the pronoun "we". Chiarelli said that he alone had the transaction with the colored man. Was any inquiry made at Powell's restaurant? Is there not something strange about the case?

We call the attention of this Honorable Court to the testimony given by the two arresting officers, Wallace and Page, concerning the package. It is significant that Chiarelli got out of the automobile on the wrong side of the street and walked around the car and across the street with this large package under his arm. There did not appear to be any effort on his part to conceal the package.

Officer Wallace testified, Tr. 12, that at the time the officers drove up Chiarelli got out of the car he was in and started to walk across the street. That Chiarelli threw a package to the ground. Tr. 14 That man got out of the car as I started to cross the street. Tr. 22 I next saw him at the corner, when he threw the package down he started to run, he ran to the corner. Tr. 22 He was about the center of the street before I pulled up to the side of the other car. Tr. 24 I turned my car around and chased this other car. Tr. 25 My partner was holding Chiarelli at the time when I returned. Tr. 25 I shot him just after

he got to the corner, trying to make his escape; that is when I shot him. Tr. 29 As he came around the car he throws the package, just before he turns from the car, in the center of the street. My partner picks up the package and starts after him. Tr. 30

> Q. You didn't know the contents of this alleged package you saw tossed by the defendant at the time he threw it, did you? A. No.

Your Honors will find it difficult to believe that the shooting took place in the manner described by these officers. We know that as a matter of law, the officers were not justified in shooting Chiarelli under the circumstances, either on the street on in their car. One might say that it makes no difference, if the defendants are guilty, the misconduct of the officers could be no excuse. That is true but there is some reason for us to pay some attention to the conduct of the officers. The trial court no doubt relied upon their testimony as to details. If in fact they were guilty of misconduct and bungled the entire matter it is possible that their testimony was colored in order to bring about a conviction, supposed by some to cure all evils. A policeman too hasty with his gun at the arrest may be a little more than anxious to see the man convicted.

We know that ordinarily Your Honors should not be bothered with argument based upon details of evidence, misconduct of police and such. But, in our view, the case at bar furnishes an example of the evil to be expected where the ordinary safeguards are disregarded in a criminal prosecution. If police officers are permitted to secure a conviction in the absence of credible evidence, because of a federal statute, there surely must be something wrong with the statute, or the construction placed upon it.

Conclusion.

The nature of the charge is such that it provoked the prosecutor to term it contemptible and caused him to refer to newspaper headlines concerning those who make vicious dope fiends sought in slayings. Tr. 121 This Honorable Court will no doubt take judicial notice of the effect on the public mind of certain investigations made by Congress into crime, racketeers, gamblers, dope peddlers, etc. Cases arising out of this investigation, including the right to televise, may eventually reach this Honorable Court. Such an atmosphere should cause the courts to be particularly careful to see that a defendant falling under this unpleasant charge relating to narcotics should have due process and that he is not condemned without proof beyond a reasonable doubt. It is very possible that the attorneys on both sides and the trial judge were diverted from the real issues because of the collateral issue introduced by reason of the unwarranted shooting of Chiarelli by the Chicago police. It is not unusual in criminal cases to find that everybody but the defendant has been placed on trial. This may explain in a measure why the prosecution failed to supply the necessary evidence, if it was at hand, but it will not entirely excuse him from seeing to it that a proper record was made and that the defendants were proven guilty. A new trial is requested in order that the Honorable District Court and the prosecuting officers might be afforded an opportunity to consider the issues raised here and to the end that the defendants might be discharged if in fact the Government is unable to establish their guilt to that degree of certainty required by law.

Also we hope that Your Honors will agree that the point raised is of sufficient importance to demand further attention. It was raised in the *Casey* case, but not squarely de-

cided because of circumstances existing there and absent here. The record made by the Government in the trial court and before Your Honors in the *Casey* case showed a great deal of the conduct of the defendant. Probably all that the Government could learn and prove. In the case at bar the Government brings a preposterous, unbelievable story given by two police officers, no effort is made to learn anything of the transaction charged in the indictment. The Government merely pointed to the statute, produced the drugs, and away they went to prison. We believe we are able to present a case wherein the Government must make use of the statute to supply required proof, or admit that it has no case. We respectfully submit that the Appeals Court opinion should be reviewed here and the judgment reversed, before it might be used in future trials as authority to dispense with evidence.

Your Honors may very well be of the opinion that the *Casey* case should not be taken as authority to overrule the Court of Appeals' cases holding that the statute does not supply the proof of venue. But the Court of Appeals, in the case at bar, has said that the statute should be so construed. This no doubt will be followed and accepted as the law, unless Your Honors correct this error.

Respectfully submitted,

Louis J. Giliberto,
Wm. Scott Stewart,
Counsel for Appellees.

APPENDIX.

Opinion of Court of Appeals in case at bar filed November 5, 1951.

Before DUFFY, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* An indictment containing three counts charged defendants with violating the government narcotic laws. Count 1 charged that they purchased heroin from an unknown person, not in or from the original stamped package, in violation of Sec. 2553(a) Title 26 U. S. C. Count 2 charged that they knowingly received, concealed, bought and facilitated the transportation and concealment after importation of heroin, knowing it to have been illegally imported in violation of Sec. 174, Title 21 U. S. C. The 3rd count charged that they conspired to commit the crimes alleged in counts 1 and 2, in violation of Sec. 371, Title 18 U. S. C.

Defendants pleaded not guilty, waived trial by jury, and were tried by the court. Both were found guilty on all counts. Serritella was sentenced to five years and Chiarelli to three years respectively, on each of the three counts of the indictment, the sentences to run concurrently. This appeal is from the trial court's judgment.

To reverse the judgment, defendants contend they were not proven guilty of the charges made in any or all of the counts of the indictment, and specifically that the government failed to make out a case warranting their conviction.

In their brief defendants say:

> "We are aware of the rule which requires that the evidence must now be reviewed in the light most favorable to the Government. *Ackerson* v. *United States*, 185

F. 2d 485. Also we realize that it will do the defendants no good to secure reversal as to only one or even two counts. If the Government has proved their guilt as to any one count, the sentence must stand. *United States* v. *Hornstein*, 176 F. 2d 217; *Sugarman* v. *United States*, 35 F. 2d 663."

The evidence for the government discloses that on or about January 28, 1950, police officers Wallace and Page, of the Narcotics Detail of Chicago Police Department, were in the vicinity of 41st Street and Calumet Avenue, in the City of Chicago, Illinois, looking for two men suspected of delivering packages containing narcotics and reported to be in that neighborhood driving a blue Oldsmobile automobile, carrying 1950 Illinois license No. 757658.

An automobile of such description, with Serritella driving and Chiarelli seated besides him, drove up in front of 4059 Calumet Avenue while the officers were waiting in their own car in close proximity. Chiarelli left the Oldsmobile carrying a package under his arm and started to walk across Calumet Avenue. Officer Wallace drove his car alongside the Oldsmobile and he and Page identified themselves as police officers. Officer Page followed Chiarelli as he crossed the street. Serritella drove his car into the side of the officer's car. To protect himself from injury, officer Wallace jumped back into his car. Chiarelli ran south on Calumet Avenue, and officer Page fired a shot in the air to halt him. But he continued to run, and was shot and wounded by officer Wallace while turning the corner at 41st Street and Calumet Avenue. Serritella fled from the scene in his Oldsmobile, pursued by officer Wallace, who was outdistanced, but later, on February 18, 1950, Serritella was apprehended in a tavern in the company of Chiarelli.

In his flight Chiarelli threw the package he was carrying into the street. The package contained heroin and did not bear the required federal tax-paid stamps. In the package

two envelopes containing heroin bore fingerprint impressions of Serritella. The blue Oldsmobile was purchased and owned by Serritella under the name of Tony Capolo, and registered with the Secretary of State of Illinois under that name. Defendants did not testify, but evidence on an issue no longer in the case was presented in their behalf.

Motions to acquit defendants were denied and a judgment finding both defendants guilty was entered.

On behalf of Serritella, it is contended that the proof did not show that he had possession of the heroin in question. *Willsman* v. *United States*, 286 Fed. 852; *Henry Woo* v. *United States*, 73 F. 2d 897, and *Grantello* v. *United States*, 3 F. 2d 117 are cited, without argument; the facts in those cases are not similar to the facts in the case before us. No argument is made here that under the evidence he did not have possession. The package containing the drug was in the Oldsmobile when the police officers drove alongside the car. The evidence showing his fingerprints on two envelopes, and his presence at the scene and participation in the happenings on January 28, 1950, in the vicinity of 4059 Calumet Avenue, was not controverted.

Sec. 2(a) of Title 18 U. S. C. provides:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

In *United States* v. *Cohen*, 124 F. 2d 164, cert. denied 62 S. Ct. 796, a narcotics case, it was said:

> "Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. *United States* v. *Hodoro-*

wicz, 7 Cir., 105 F. 2d 218, 220, certiorari denied, 308 U. S. 584, 60 S. Ct. 108-84 L. Ed. 489; *Vilson* v. *United States*, 9 Cir., 61 F. 2d 901."

It is apparent from this record that appellants were acting in concert in an illegal undertaking, and that the narcotics in question were in possesion of both.

It is also contended that the proof failed to show that Chiarelli had knowledge of the contraband narcotic contents of the package he threw into the street in trying to flee from officer Page. Whether he had such knowledge was a question for the trier of the facts—*United States* v. *Feinberg*, 123 F. 2d 425. And inferences reasonably drawn from evidence presented are also for the fact trier. *Rendleman* v. *United States*, 38 F. 2d 779, 780.

Section 174, Title 21 U. S. C. provides in part:

> "Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Section 2553(a) Title 26 U. S. C., provide in part:

> "* * * the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found."

Thus the burden of explaining and justifying possession of the heroin was upon defendants. *Landsborough* v. *United States*, 168 F. 2d 486, certiorari denied, 335 U. S. 826; *Stoppelli* v. *United States*, 183 F. 2d 391. They failed to explain and justify such possession.

Defendants urge "that the fingerprint evidence is of little or no value." Two fingerprints of Serritella were found on envelopes containing the heroin. He was the driver of the

automobile from which Chiarelli emerged carrying the package containing the heroin, and was identified as being at the scene on January 28, 1950, and later arrested in company of Chiarelli. He fled from the scene just as Chiarelli attempted to do. The fingerprint evidence was properly admitted and considered by the trial court in arriving at its finding and judgment.

Defendants say that each count of the indictment alleges "a quantity of a certain derivative of opium, to-wit: 177 grains of heroin" and that no proof of the quantity is made by the Government. Defendants apparently attempt to bring themselves within the scope of Sec. 2551 (a) of Title 26 U. S. C., which exempts from the operation of Sec. 2553(a) the possession of one-eight of a grain or less of heroin.

A defendant claiming to come within that exemption has the burden of so showing.

The physical exhibits were before the trial court and were admitted in evidence without objection on the part of defendants.

In a case where a similar contention was made, this court in *United States* v. *Holmes*, 187 F. 2d 222, said:

> "The size of the package was a physical exhibit before the trial judge, but in addition we think that the burden of proof was on the defendant to show that he came within the exemption of that Statute."

In the case before us, no such proof was made by defendants and no objection was made by them on the trial to any lack of proof of quantity. The objection is raised here for the first time. If there is merit to the point it would apply only to count 1. The record shows no proof on the point, but lack of such proof will be of no avail to defendants, as it is not necessary that there be sufficient evidence to sustain a judgment of guilt on all counts of the indictment. Conviction on either counts 2 or 3 would support the judgment of conviction. *United States* v. *Hornstein*, 176 F. 2d 217.

The sentences imposed by the court are well within the maximum sentences permitted by the law.

Although no objection was made by defendants on the trial that the substance contained in the package in evidence was heroin hydrochloride, and came within the purview of Sec. 2553(a) Title 26, and Sec. 174 Title 21 U. S. C., they urge here that no proof was made that heroin hydrochloride was a derivative of opium. There seems no longer any question that heroin is a derivative of opium, and the District Court properly took judicial notice of that fact. *United States* v. *Holmes, supra*; *Chadwick* v. *United States*, 117 F. 2d 902, 903; *Hughes* v. *United States*, 253 Fed. 543-545; *James* v. *United States*, 279 Fed. 111-112, and *Greenberg* v. *United States*, 285 Fed. 865-867.

Defendats claim that venue was not established on the trial. The record before us is replete with references t the facts in evidence taking place in Chicago, Illinois.

If, upon the whole evidence, it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient. *United States* v. *Jones*, 174 F. 2d 746-749. This record shows direct and positive proof of venue in Chicago, Illinois. And, of course, Chicago is in the Northern District of Illinois, Eastern Division. Moreover, the absence of tax-paid stamps and possession of the drugs constituted prima facie evidence of illegal purchase, and also venue.

In *Anderson* v. *United States*, 189 F. 2d 202-205, the United States Court of Appeals, Sixth Circuit, discusses a conviction under Sec. 2553(a), in part, as follows:

> "Some of the earlier cases (*Cf. Brightman* v. *United States*, 8 Cir. 7 F. 2d 532) hold that under this statute no presumption arises with respect to venue; but these holdings were reversed in *Casey* v. *United States, supra.* (276 U. S. 413.) In that case a judgment holding that venue had not been established was re-

versed upon the ground that the absence of tax-paid stamps and possession of the drugs constituted prima facie evidence not only of illegal purchase, but of venue. There, as here, no testimony was introduced directly concerning the purchase. The court, speaking through Mr. Justice Holmes, declared that the statute requires a defendant to prove the facts peculiarly within his own knowledge and hidden from discovery by the Government. It was squarely held that the defendant must show he obtained the drugs in a mode permitted by law, and that because of the contradictory and unbelievable statements of the defendant, the presumption controlled. In *Acuna* v. *United States*, 5 Cir. 74 F. 2d 359, and *Frazier* v. *United States*, 82 U. S. App. D. C. 332, 163 F. 2d 817, which involved charges of violation of the Narcotics Act, no direct proof of the fact of purchase was given. However, the court held that possession of the drugs in containers not bearing tax-paid stamps raised a presumption which in absence of a satisfactory explanation justified conviction. These decisions, squarely in point, require that we affirm the judgment."

Defendants contend there is a failure of proof of the conspiracy alleged. The record convinces us that the contention lacks merit.

The evidence shows both defendants had possession of the heroin; the absence of tax-paid stamps; that the package thrown into the street by Chiarelli contained heroin, and possession of the drug was not explained to the satisfaction of the trier of the facts.

The court believed the witnesses for the government and found defendants guilty, and the record before us supports that finding by substantial and convincing evidence.

The judgment of the District Court is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 457

NATHAN CHIARELLI AND SAM SERRITELLA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 152-157) is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1951 (R. 158). The petition for a writ of certiorari was filed on December 3, 1951. The jurisdiction of this Court is invoked

under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the Government sufficiently proved all the elements of the offenses charged, including venue.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 11-13.

STATEMENT

An indictment containing three counts (R. 2-4) was returned against petitioners jointly in the United States District Court for the Northern District of Illinois. Count one (R. 2-3) charged a violation of 26 U.S.C. 2553(a) in that, on January 28, 1950, at Chicago, Illinois, they purchased, from unknown persons, 177 grains of heroin, a derivative of opium, which was not in or from the original stamped package. Count two (R. 3) charged a violation of 21 U.S.C. 174 in that, at the same time and place, they fraudulently and knowingly received, concealed, bought, and facilitated the transportation and concealment of such heroin, knowing it to have been illegally imported into the United States. Count three (R. 3-4) charged that, at the same time and place, they conspired to commit the offenses alleged in the first two counts, in violation of 18 U.S.C. 371.

Both petitioners, having waived a jury trial (R. 5-7), were tried together and found guilty on all three counts (R. 139-143). Chiarelli was sentenced

to three years' and Serritella to five years' imprisonment on each count, the terms to run concurrently (R. 143). On appeal, the judgments of conviction were affirmed (R. 158).

The evidence introduced by the Government may be summarized as follows:

On January 28, 1950, two members of the Narcotics Section of the Chicago Police Department, having been informed that two men, operating a certain described vehicle, were suspected of delivering packages of narcotics, observed petitioners pull up in a vehicle answering the given description in the vicinity of Calumet Avenue and 41st Street in the City of Chicago, Illinois (R. 9-12, 18, 20-21, 45-47). Serritella was driving and Chiarelli was seated beside him (R. 13, 21, 24-25, 59). The officers drove up alongside petitioners' automobile[1] as Chiarelli emerged with a package under his arm (R. 12, 14, 21, 22, 24-25, 47, 49-52). Wallace, exhibiting his badge to Serritella, identified himself as a police officer (R. 12, 22, 24). Making known his official capacity officer Page, gun in hand, proceeded after Chiarelli, who discarded his package and began to run (R. 47-48, 49-52). Meanwhile, Serritella rammed his car against the officer's vehicle and sped away (R. 12-14, 22, 37,

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[1] It was shown that in November, 1949, petitioners, using the name of Tony Capolo, bought a vehicle, which they later traded-in for the automobile in which they were riding (R. 66-68, 69-73, 77, 95). The latter vehicle was also registered with the Secretary of State of Illinois under the name of Tony Capolo (R. 15, 44, 61, 64-65, 95).

38, 47, 53-54). Chiarelli was arrested at the scene, and the discarded package was retrieved by officer Page (R. 16, 25, 48, 51, 52).[2] Subsequently, the Chicago police surrendered Chiarelli and the package to the custody of the federal narcotic agents, who took over the case (R. 16-17, 48, 57, 78-79, 80-81, 88).[3] The package consisted of newspaper wrapping, which contained five one ounce cellophane bags of heroin hydrochloride (R. 16-18, 48, 78-79, 80-81, 87, 89). Two of those bags bore fingerprint impressions of Serritella (R. 82, 90, 92-94). No stamps evidencing the payment of tax were affixed, either to the package or to any of the cellophane envelopes contained therein (R. 14, 48, 82).

Petitioners did not testify in their own behalf.[4] They moved for judgments of acquittal at the close of the Government's case, and again at the close

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[2] After his arrest Chiarelli stated to the police that the package was given him in a nearby Chicago restaurant by a colored man, who paid him $50 to deliver it to an address on Calumet Avenue (R. 14, 48-49, 60, 63-64).

[3] About a month later, Serritella was apprehended by a federal narcotics agent in a Chicago tavern, while in the company of Chiarelli (R. 79, 81-82).

[4] Petitioners, on cross-examination of the police officers, brought out the fact that, after a warning shot fired by Page had failed to halt Chiarelli, Wallace, before giving chase to Serritella, fired a shot which brought Chiarelli down with a wound, just as he was about to turn a corner (R. 29-32, 38-41, 48, 52-54). It was also shown that while Wallace was questioning Chiarelli in the back of his car, following his return to the scene from his unsuccessful pursuit of Serritella, his gun had been accidently discharged, with the spent pellet lodging itself harmlessly in the rear-seat cushion (R. 25-26, 28-29, 32-34, 41, 48, 55-56, 58-59). With an announced purpose to

of all the evidence; the motions were denied (R. 100, 111).

ARGUMENT

Petitioners do not deny that while in each other's company in Chicago, Illinois, one of them had in his physical possession a package, which contained a quantity of heroin hydrochloride. They complain that, relying solely upon statutory presumptions from possession, without proving their knowledge of the contents of the package and without otherwise proving a proper venue, the Government convicted them of the crimes of purchasing tax-unpaid heroin, of concealing and transporting it with knowledge that it had been illegally imported, and of a conspiracy to commit such offenses (Pet. 16-44). We submit that the Government has proved, as to each petitioner, all the elements of each offense charged in the indictment. Moreover, if the evidence is sufficient to sustain the conviction on any one count, the sentences im-

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discredit the testimony of the police officers, petitioners called an expert, whom the court permitted to testify, over objection, solely to explain the testimony relative to their flight, since such evidence, if unexplained, might be considered a circumstance of guilt (R. 102-103). The expert testified that he had examined Chiarelli, who told him that the bullet wound sustained by him was caused by Wallace's discharge of the firearm in the rear of his car, and that in his opinion Chiarelli's version of the shooting was consistent with the type of wound inflicted (R. 103-107). However, on cross-examination, he admitted that from the nature of the wound, it also could have been inflicted at the time Wallace shot at Chiarelli while he was fleeing (R. 107-108). Petitioners abandoned this issue as one of their grounds on appeal to the court below (R. 154), and they expressly elect not to make it an issue in their present petitions (Pet. 3; but see Pet. pp. 43, 44).

posed on petitioners would remain undisturbed, since they were imposed on the whole indictment and do not exceed the maximum that could have been given under any one count. *Powers* v. *United States,* 223 U. S. 303, 312; *United States* v. *Hornstein,* 176 F. 2d 217, 219 (C.A. 7); *United States* v. *Empire Packing Co.,* 174 F. 2d 16, 19 (C.A. 7), certiorari denied, 337 U. S. 959; cf. *Claassen* v. *United States,* 142 U. S. 140, 146.

1. Possession of proscribed narcotics is, under the statutes involved (See Appendix, *infra,* pp 11-13), sufficient to make out a *prima facie* case of commission of the offenses charged in counts one and two. Petitioners' argument that this statutory presumption does not supply proof of venue has been consistently rejected by the courts. *Casey* v. *United States,* 276 U. S. 413; *Frazier* v. *United States,* 163 F. 2d 817, affirmed, 335 U. S. 497; *Anderson* v. *United States,* 189 F. 2d 202 (C.A. 6). Moreover, as to count two, there was affirmative evidence that the drugs had been transported to Chicago. *Supra,* p.p. 3-4.

2. Petitioners' claim that there was no proof that Serritella had possession of the drugs (Pet. 19-20) is clearly without merit. The narcotics physically held by Chiarelli were actually within the joint possession of both petitioners. The uncontroverted evidence shows that the newspaper-wrapped package containing the drugs was transported, on the day involved, in the vehicle driven

by Serritella, whose fingerprints appeared on two cellophane envelopes, containing heroin, found inside the package (R. 12-14, 21-22, 24-25, 47, 59, 82, 87, 89, 90, 92-94). Coupled with the other evidence showing concerted movements of Serritella and Chiarelli, the fingerprint evidence was entirely competent and strongly persuasive in connecting Serritella with the narcotics. Indeed, Serritella aided in the transportation of Chiarelli, whose possession of the contraband was incidental to such transportation. Thus viewed, the evidence sufficed to warrant the inference of joint possession on the part of petitioners. *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U. S. 811; *United States* v. *Hodorowicz*, 105 F. 2d 218, 220 (C.A. 7), certiorari denied, 308 U. S. 584; *Colletti* v. *United States*, 53 F. 2d 1017 (C.A. 6), certiorari denied, 285 U. S. 559.

3. The contention that the Government failed to prove knowledge of the nature of the contents of the package (Pet. 21-23) is also without merit. Chiarelli's act of discarding the package and fleeing on the approach of the police was evidence of his guilty knowledge, just as Serritella's act in ramming the officer's car in an effort to escape is strongly indicative of guilty knowledge on his part (R. 12-13, 14, 22, 48, 52). These were inferences which the trier of the facts was entitled to draw. *United States* v. *Feinberg*, 123 F. 2d 425 (C.A. 7);

Rendleman v. *United States,* 38 F. 2d 779, 780 (C.A. 9). Petitioners contend, however, that when the Government introduced evidence of Chiarelli's statement that he had been given $50 to deliver the package, the Government had vouched for the truth of that statement exactly as if it had made Chiarelli its own witness, thereby sufficiently explaining his possession so as to vitiate the statutory presumption (Pet. 36-40). This contention is untenable. The Government introduced Chiarelli's explanation to show the high degree of improbability of the existence of a satisfactory explanation, and, alternatively, to permit an inference therefrom that he must have been aware of the illicit character of the package's content, for he could not have been so naive as to think that a stranger would pay him $50 to perform a simple, innocent errand. Assuming, *arguendo,* that the Government is bound by the statement, the explanation did not automatically overcome the Government's *prima facie* case against petitioners. To do so it had to satisfy the trier of the facts that the possession was free from criminal taint. *Gonzales* v. *United States,* 162 F. 2d 870 (C.A. 9). Here, as the trier of facts presumably found, the explanation of possession was not satisfactory.

4. 26 U. S. C. 2551(a) exempts from the operation of 26 U. S. C. 2553(a), the statute on which count one was founded, the possession of preparations which do not contain more than one-eighth

of a grain of heroin. Petitioners argue (Pet. 26-30) that the Government failed to negative that exception. However, each of the five envelopes containing the heroin was physically exhibited to the trial judge, who was satisfied that there was a sufficient quantity to bring it within the purview of section 2553(a). Moreover, the burden was on petitioners to prove that they came within the exemption of that statute. The Government was not required to negative the exempion. *United States* v. *Holmes,* 187 F. 2d 222, 225 (C.A. 7), certiorari denied, 341 U. S. 948; cf. *McKelvey* v. *United States,* 260 U. S. 353, 357.

Petitioners argue (Pet. 28) that heroin is not a "derivative" of opium since it is derived, not from opium directly, but by a chemical action on morphine which in turn is a derivative of opium. They state that by definition the term derivative is limited to an immediate product of a given substance. Clearly, Congress did not intend to use the term "derivative" in any such limited sense. The courts have taken judicial notice that heroin is a derivative of opium. *United States* v. *Holmes,* 187 F. 2d 222, 225 (C.A. 7); *Hughes* v. *United States,* 253 Fed. 543, 545 (C.A. 8), certiorari denied, 249 U. S. 610. Nor was there any error because of the allegation of heroin in the indictment and the proof that the substance possessed by petitioners was heroin hydrochloride. This merely means that the heroin was mixed with hydrochlo-

ride. See United States Dispensatory (1947), p. 358.

5. Petitioners' contention (Pet. 31-35) that the Government failed to prove the conspiracy alleged in count three is without merit. The evidence set forth in the Statement shows an abundance of circumstances involving petitioners' concerted actions, which, coupled with the events of January 28, 1950, justified an inference that there was a tacit agreement between them to violate the federal narcotic statutes. *United States* v. *Kissel,* 218 U. S. 601, 607, 608; *United States* v. *Glasser,* 116 F. 2d 690, 699-700 (C.A. 7), reversed in part, 315 U. S. 60; cf. *Direct Sales Co.* v. *United States,* 319 U. S. 703. The evidence was more than sufficient to establish overt acts within the district where venue was laid (R. 12-14, 21-22, 24-25, 47, 49-52).

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question warranting further review by this Court. It is therefore respectfully submitted that the petition should be denied.

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JANUARY 1952.

APPENDIX

Statutory Provisions

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

21 U. S. C. 174 (38 Stat. 275, as amended, 42 Stat. 596, provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of

the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U. S. C. 2550(a) (53 Stat. 269, as amended, 60 Stat. 39) provides:

> There shall be levied, assessed, collected, and paid upon opium, isonipecaine, coca leaves, opiate, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

26 U. S. C. 2551(a) (53 Stat. 270) provides in pertinent part as follows:

> The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which

are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided,* That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subchapter and said part V: * * *

26 U. S. C. 2553(a) (53 Stat. 271, as amended, 58 Stat. 721) provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 457

NATHAN CHIARELLI and SAM SERRITELLA,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

We did not reply to the Brief of the Government in opposition to our Petition For Certiorari and we feel that there are certain points which may have been overlooked and should be emphasized.

Defendants were arrested without warrant, waived trial by the jury, and were convicted on three counts, charged with violation:

I. 26 U.S.C. 2553 (a) (Purchase of Narcotics) (tr. 2).

II. 21 U.S.C. 174 (fraudulently and knowingly receiving and transporting narcotics) (tr. 3).

III. 18 U.S.C. 371 (conspiracy based on the first two counts) (tr. 3). A reversal of Counts I and II would result in a reversal of Count III charging the conspiracy.

We contend that the Government failed to prove venue of the purchase of the drugs under the first count and that the case of *Casey* v. *United States,* 276 U.S. 413 does not in any way eliminate the necessity to prove venue as we wish to point out later. We also wish to pay particular attention to the Government's case which is based upon the evidence concerning the flight of the defendant, Serritella, and the attempted flight of the defendant, Chiarelli.

We respectfully submit that without the aid of the presumptions, which we contend were erroneously applied, the Appeals Court could not, on the basis of the evidence presented affirm the decision of the District Court.

VENUE.

In regards to venue, under Count I, a violation of 26 U.S.C. 2553 (a) the lower Courts held that under the statutes two *presumptions of law* arose therein:

1. Presumption of a purchase.

2. Presumption of venue

citing *Casey* v. *U.S., supra,* in support of their contention as to venue. During the trial of the case at Bar, no evidence whatever of any kind as to the defendants' movements prior to their arrest nor to any acts or movements on defendants part to indicate a purchase *or an inference* of a purchase was presented.

Our contention is that the lower Courts erred in holding that there were two *presumptions of law* arising out of

Statute, *supra*. The Courts have consistently held that a presumption cannot be based upon a presumption.

Manning v. *Insurance Company*, 100 U.S. 693;
Cunard S.S. Co. v. *Kelley*, 126 Fed. 610;
C. M. & St. P. Rwy. v. *Coogan*, 271 U.S. 473;
31 C.J.S. Sec. 116B, Page 727 and cases cited.

We further contend that the *Casey* case, *supra*, does not state that two *presumptions of law* arose from the Statute in Count I but: (1) that a *presumption of law* arose as to purchase of drug (2) that a *presumption of fact* arose as to venue. We find that the Court referred to a second type of prima facie evidence in the *Casey* case, *supra*, in that the Court said on page 418:

> "The Statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the Statute creates, 4 Wigmore Evidence 2494."

So we can see that the Court had in mind a second type of prima facie evidence noted in 4 Wigmore Evidence, Sec. 2494, in which the two types of prima facie evidence are set out as follows:

1. That type of prima facie evidence which creates a presumption at law and which is controlling upon the judge and jury.

2. That type of prima facie evidence which creates a presumption of fact which merely means evidence sufficient in quantity for the jury to consider.

We believe the Court relied upon the second type of prima facie evidence from further reading from the *Casey* case, *supra*, on pages 417, 418:

> "But we are of the opinion that upon the facts of this case the court was right. *If the Jury believed the*

> *defendant, long established in Seattle, said that he had not the drug, but would and shortly thereafter did, furnish it* (Italics ours), the inference that he bought it in Seattle is strong."

Under this line of reasoning it is plain that the Court was relying not upon a presumption of law but upon a presumption of fact and it is comparable to the prima facie evidence which we have cited, Wigmore, *supra,* Sec. 2494 (2), pertaining to presumption of fact whereby it is merely evidence to be considered by the Judge or Jury. We also contend that the Court in the *Casey* case, *supra,* relied on the fact that the evidence showed that shortly before his arrest Casey was asked to furnish the witnesses with the drug, and answered that he did not have any on his person, but that he would be back shortly; and that shortly thereafter he produced the drugs. Based upon the fact that Casey could not have gone outside the city of Seattle in such a short time, a presumption of fact arose.

However in the case at Bar, there was no evidence concerning the defendants immediately prior to their arrest so that an inference or a presumption of fact as to the venue could arise. The purchase might have been made in Missouri, or anywhere beyond the Court's jurisdiction.

We therefore contend that the presumption or prima facie evidence as to venue in the *Casey* case, *supra,* is not a presumption of law, but a presumption of fact. And on presumptions of fact we cite 4 Wigmore 2491. "They are in truth but mere arguments, and depend on their own natural force and efficacy in generating belief or conviction in the mind" * * * "the jury may give to them whatever force or weight it thinks best—just as it may to other evidence."

Therefore, being a presumption of fact it does not of itself, as a presumption of law would, supply venue unless

supported by evidence, and which evidence must meet the tests imposed upon evidence of any kind, in a criminal case, that is, proof beyond a reasonable doubt. We also wish Your Honors to note that under 26 U.S.C.A. 2554; *U.S.* v. *Jones,* 174 Fed. 2nd 745, regarding the sale of narcotics, the Court held that venue had to be proven; that under no other statute do the Courts give the construction which the lower Courts would place upon Sec. 2553 (a). We believe that if such a construction is placed upon it it is against the Sixth Amendment to the Constitution. We contend therefore that venue must be proved. *Brightman* v. *U.S.,* 7 Fed. 2nd 532; *DeMoss* v. *U.S.,* 14 Fed. 2nd 1021; *Cain* v. *U.S.,* 12 Fed. 2nd 580, and that in the case at bar venue as to purchase under Count I was not proven.

EVIDENCE OF FLIGHT.

The evidence surrounding the flight of the defendants[1] as given by the Government witnesses[2] is as follows:

1. The arresting officers were not in police uniform (tr. 12).
2. The police car did not bear any marking to identify it as a police car (tr. 11).
3. The police car used by the City of Chicago police belonged to Officer Wallace personally (tr. 11).
4. The Chicago police identified themselves under most dubious circumstances: (a) Officer Wallace (not in police uniform (tr. 12) attempted to identify himself as a Chicago police officer as his car drew alongside the car of the defendants by pulling his coat back to exhibit his star, and yelled "Police officers," and at-

[1]There was no warrant as to either defendant; Chiarelli was arrested immediately and Serritella was arrested about a week later.

[2]The defendants did not testify.

tempted to get out of his car, all in one continuous motion (tr. 12). (b) Officer Page (not in police uniform tr. 12) got out of his car with gun in hand, ran across the street towards Chiarelli, yelled "police officers" (tr. 50, 52).

5. The car in which defendants were riding had its windows closed as it was a cold January morning (tr. 21).

Under these circumstances any person would run though he be innocent; and defendants would reasonably and justifiably assume that it was an attempt on their lives from persons unknown. In most jurisdictions had the defendants been armed they would have been justified in killing the police officers under these circumstances, *People* v. *Scalisi*, 324 Ill. 131.

We also wish to particularly point out that counsel for the government stipulated that it would not alone rely upon the flight of Chiarelli as evidence of his guilt (tr. 27). We believe the Government realized the circumstances of flight did not provide the Government with sufficient evidence of guilt and we contend this statement on behalf of the Government (tr. 27) is an admission on the part of the Government.

We belive that evidence of flight is important because of the Government's position that the evidence of flight made the defendants guilty of the knowledge of the package which Chiarelli was carrying. We contend that under the above circumstances the evidence of flight cannot be construed against the defendants as evidence of guilt.

STATEMENT OF CHIARELLI.

We wish to emphasize to the Court the testimony of the two arresting officers[1] regarding Chiarelli's statement while lying wounded in the emergency room of Michael Reese Hospital.

Officer Page, one of the arresting officers testified Chiarelli told him he was given $5.00 for delivering the package (Tr. 48). Officer Wallace[2] the other arresting officer testified Chiarelli told him he was given $50.00 (tr. 48). (Officer Wallace admitted that there was a claim that he shot Chiarelli in the back seat of the police car (tr. 32).

THE FINGERPRINT EVIDENCE OF SERRITELLA.

As we have stated in our petition, the evidence as to Serritella's fingerprints is not valid in that the expert in the case at bar gave no opinion further than that he found a print on each of two envelopes out of five. The envelopes were empty when he examined them. He gave no opinion or circumstance to exclude the possibility that they were empty when touched by Serritella. Here again we must presume that the envelopes contained the drugs at the time Serritella first imprinted his prints upon the envelopes. We know from 31 C.J.S. Sec. 116 B, Page 727 and refer to the cases cited: "Inferences cannot be based on inferences."

As to the defendant Chiarelli—Chiarelli was not shown to have been present when the fingerprints were made nor is

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[1]Two other officers who were not involved in the arrest testified Chiarelli stated he was given $50.00 (tr. 61, 64).

[2]We contend that Wallace's testimony may have been colored because of the suspicious shooting in which he was involved.

there any evidence from which to infer that they were made during the performance of a joint venture.

We wish to make one further point in that Officer Page (tr. 48), Officer Magan (tr. 49), Officer Wallace (tr. 16, 17, 18), Officer Blazek (tr. 61), Agent Newman (tr. 79), Agent Fonner (tr. 78) and Mr. Sheehan (tr. 81) all handled the 5 envelopes which were supposed to have contained the drug in question, yet Mr. Sheehan testified that there was only one print of Serritella's left little finger on each of the 2 envelopes which were supposed to contain the prints (tr. 92, 93, 94, 95, 96); one would wonder how so many people could handle five envelopes and yet have only the prints of Serritella on them.

We pray that a rehearing be granted in order that we may have further opportunity to support our claim here under the law and facts as shown by the record.

Respectfully submitted,

WM. SCOTT STEWART and
LOUIS J. GILIBERTO,
Counsel for Petitioners.

Wm. Scott Stewart and Louis J. Giliberto hereby certify that this petition is restricted to substantial matters available to petitioners but not previously presented.

WM. SCOTT STEWART,

LOUIS J. GILIBERTO,
Counsel for Petitioners.